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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-115

NORMAN H. EGENBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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In answer to petitioner's contention that the Government converted a false statement charge which should have been brought under the misdemeanor section (Title 26, U.S.C. §7207) rather than the felony section (Title 18, U.S.C. §1001), respondent argues:

> "It is well settled, however, that Section 1001 applies to false statements on tax returns. See, *e.g.*, *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Knox*, 396 U.S. 77."

and further:

> "Where, as here, a defendant's conduct violates overlapping statutes, one of which charges a felony and the other a misdemeanor, the choice of which offense to prosecute is a matter within the discretion of the prosecutor. *United States* v. *Beacon Brass Co., supra,* 344 U.S. at 45; see *Sansone* v. *United States,* 380 U.S. 343; *Berra* v. *United States,* 351 U.S. 131; [and two other lower court decisions]."

Section 7207, Title 26, U.S.C. was enacted in the 1954 Internal Revenue Code some two years before this Court's opinion in *United States* v. *Beacon Brass Co., supra. Sansone* v. *United States,* 380 U.S. 343 (1965). In addition, in *United States* v. *Beacon Brass Co.,* the issue was not whether Section 35(A) of Title 80, U.S.C., the predecessor of Section 1001, Title 18, U.S.C., applied to income tax returns; it was rather whether a false statement with respect to an income tax return could be considered a further attempt to evade taxes under Section 145(b), Title 26, U.S.C. In passing upon this question, this Court said:

> "We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." 344 U.S. at 45.

In *United States* v. *Knox,* also cited by respondent in support of its statement that Section 1001 applies to false statements on tax returns, the issue as to the propriety

of charging the offense under Section 1001 was not even raised. Neither of these opinions of this Court, therefore, supports respondent's contention that Section 1001, Title 18, U.S.C., may properly be invoked for a false statement on a tax return after Congress enacted Section 7207, Title 26, U.S.C., in 1954. There thus remains the issue whether after the amendment to the Internal Revenue Code in 1954 when Section 7207 was first enacted Congress intended that any false statement relating to a tax return should be confined to Section 7207. This should be considered in the light of the failure of Congress to provide in Section 7207 that the penalty there provided was "in addition to other penalties provided by law," a fact noted with some consideration in this Court's opinion in *United States* v. *Beacon Brass Co.*, 344 U.S. *supra* at 46.

Respondent concludes that where a defendant's conduct violates overlapping statutes, it is up to the prosecutor in his own discretion to determine whether to proceed under the felony or the misdemeanor. In this connection, respondent cites this Court's opinions in *United States* v. *Beacon Brass Co., Sansone* v. *United States,* and *Berra* v. *United States,* as well as two lower court opinions. It is respectfully submitted that none of the opinions of this Court supports such a statement by respondent. *United States* v. *Beacon Brass Co.* does not; neither does this Court's opinion in *Sansone* v. *United States.* Indeed, in *Berra* v. *United States,* this Court limited its decision as follows:

> "The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction." 351 U.S. at 135

Respondent cannot brush by the facts here and dispose of the issue on a theory of prosecutorial discretion under overlapping statutes. This Court has indicated in *United States* v. *Beacon Brass Co.* that:

> "At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." 344 U.S. *supra* at 45.

Facts necessary to prove a violation of Section 7207, Title 26, U.S.C., are identical, it is respectfully submitted, to that necessary to constitute a violation of Section 1001, Title 18, U.S.C. In other words, proof to convict under Section 7207 is sufficient to convict under Section 1001, Title 26, U.S.C.

In a comparable situation, a defendant argued in *United States* v. *Coppola,* 425 F.2d 660 (2d Cir. 1969), that Section 7201, Title 26, U.S.C., relating to a wilful evasion of taxes was unconstitutional where on the facts charged he was guilty of the misdemeanor under Sections 7203 and 7207 of Title 26, U.S.C. The Circuit Court noted that "in order to state a claim of constitutional dimensions, Coppola must establish the converse, that a violation of either misdemeanor section would invariably constitute a violation of the felony provision." 425 F.2d *supra* at 661. Petitioner submits that is exactly what has been done here notwithstanding respondent's contentions to the contrary.

It is respectfully submited that a grant of certiorari is warranted to prohibit the unlawful, improper, arbitrary, and unfettered discretion of a prosecutor to convert an offense which Congress specifically described in Section 7207, Title 26, U.S.C., as a misdemeanor, sub-

ject to a maximum penalty of one year imprisonment, to a felony under Section 1001, Title 18, U.S.C., subject to a maximum penalty of five years imprisonment.

Respectfully submitted,

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October 14, 1971